Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RONALD FOSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 28 U.S.C. § 2680(h), which provides that claims based on assault and battery are excluded from coverage is applicable to bar the negligent supervision of a governmental employee who attacks another employee?

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PETITION FOR A WRIT OF CERTIORARI

Ronald Foster respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra* 1a-4a) is unreported. The opinion of the district court (App., *infra* 5a-12a) is unreported.

JURISDICTION

The court of appeals entered its judgment on August 30, 2000 (App., *infra* 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1346(b) provides in relevant part:

> . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2680(h) provides in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to . . . (h) [a]ny claim arising out of assault, battery, . . .

O.C.G.A. § 34-2-10 provides in relevant part:

> Every employer shall furnish employment which shall be reasonably safe for the employees therein, shall furnish and use safety devices and safeguards, shall adopt and use methods and processes reasonably adequate to render such an employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees.

STATEMENT

Plaintiff filed suit against the United States in February 1999, and alleged that the United States had failed to properly supervise another Postal Service worker who had viciously attacked him. The District Court granted the Government's motion to dismiss for lack of jurisdiction. The Court of Appeals affirmed.

A. The Allegations Of The Complaint

As the District Court noted:

> the court must accept the allegations in the plaintiff's complaint as true and construe the facts in a light most favorable to the plaintiff.

Plaintiff alleged that he had been employed by the Postal Service for 10 years and that he felt discriminated

against and harassed by a woman named Felicia Williams who was herself married to an employee named Ricky Williams.

He alleged that Mr. Williams had been told by his wife that plaintiff had made an "adverse sexual reference to her." He alleged thereafter that, in "the employee parking lot of the Atlanta Bulk Mail Facility," Mr. Williams struck him with a hand gun and fired the gun at him, although he missed "but damag[ed] his vehicle's front seat, rear seat, and rear floor board.

He alleged further that defendant

> had actual knowledge of Ricky Williams' violent temperament . . . prior [to the] assault . . . yet it retained him in its employ and failed to take reasonable action to prevent him from harming plaintiff

that

> [d]espite plaintiff's repeated requests and its actual knowledge of the situation, the Postal Service failed . . . to protect plaintiff from the severe and personal harm he suffered as a result of [the] assault

and defendant

> failed to take reasonable steps to provide adequate security for its employees at the Atlanta Bulk Mail and to prevent this incident from occurring.

He concluded that defendant's "negligence caused the injury of plaintiff."

B. Proceedings Below

The instant case was dismissed for lack of jurisdiction. The District Court held that the claim was barred by *Metz v. United States*, 788 F.2d 1528 (11th Cir. 1986) (App. *infra* at 8), whose principles had not been overruled by *Sheridan v. United States*, 487 U.S. 392 (1988), and further that, under Georgia law, no cause of action existed (App. *infra* at 10).

The Court of Appeals affirmed without mentioning *Metz*. Instead, the Court noted its agreement with *Leleux v. United States*, 178 F.3d 750 (5th Cir. 1999) (App. *infra* 2-3), and also held there was no tort claim under Georgia law (App. *infra* at 4).

REASONS FOR GRANTING THE PETITION

The petition for writ of certiorari should be granted to resolve lingering ambiguities inherent in *Sheridan v. United States*, 487 U.S. 392 (1988), and to resolve the split of authority among the Circuits concerning the proper reach of 28 U.S.C. § 2680(h).

1. The Court of Appeals' Interpretation Of 28 U.S.C. § 2680(h) Conflicts With The Ninth Circuit's Interpretation And Aggravates The Existing Split Of Authority

The Ninth Circuit has repeatedly faced the same issue as the Eleventh Circuit did in this case. That Court has repeatedly held that a negligent supervision claim survives despite the exclusion of 28 U.S.C. § 2680(h). *See*

Bennett v. United States, 803 F.2d 1502, 1503-1504 (9th Cir. 1986), even after Justice Kennedy's concurrence in *Sheridan v. United States*, 1487 U.S. 392, 405-407 (1988), *Brock v. United States*, 64 F.3d 1421 (9th Cir. 1995).[1] *Senger v. United States*, 103 F.3d 1437 (9th Cir. 1996). In an unpublished opinion (text available in Westlaw), the Court has said that there need not be "a special relationship between the government and the victim of the intentional tort . . . to maintain a claim of negligent supervision." *Gilligan v. United States*, 141 F.3d 1176 (9th Cir. 1998).

There are at least three other circuits besides the Eleventh Circuit and Fifth Circuit that will not allow a negligent supervision claim whether Plaintiff alleges an independent basis of duty or not. *Thigpen v. United States*, 800 F.2d 393 (4th Cir. 1987); *Hoat v. United States*, 790 F.2d 836, 838 (10th Cir. 1986). *Johnson v. United States*, 788 F.2d 845 (2d Cir. 1986).

Indeed, the confusion regarding this issue is best typified by the decisions in the Fifth Circuit. *See Fair v. United States*, 234 F.2d 288 (5th Cir. 1956) (cause of action stated); *Shively v. United States*, 345 F.2d 294, 297 (5th Cir. 1965) (no cause of action stated); *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966) (cause of action stated); *Garcia v. United States*, 776 F.2d 116, 118 (5th Cir. 1985) (precedent characterized as "equivocal").

A resolution of the conflict is unlikely to be resolved absent decision from this Court.

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[1] The Fifth Circuit explicitly disagreed with *Brock* in *Leleux v. United States*, 178 F.3d 750 (5th Cir. 1999). The Eleventh Circuit decision in the instant case explicitly relied upon *Leleux*.

2. The Decision Is Wrong

Although there is little discussion by the Eleventh Circuit, the decision is in conflict with the broad principles of *United States v. Muniz*, 374 U.S. 150 (1963) and *Sheridan v. United States*, 487 U.S. 392 (1988).

Muniz is a case in which this Court held that the United States could be liable for its failure to protect a prisoner from the attack of another prisoner, that is, from an assault and battery. *See Panella v. United States*, 216 F.2d 622 (2d Cir. 1954).

Thus, these cases stand squarely for the proposition that not all cases of assault and battery are barred under the FTCA if the injury results from negligence. This Court held as much in *Sheridan*.

> As [Justice] Harlan explained:
>
> > the Act covers actions for personal injuries 'caused by the negligent or wrongful act or omission of *any employee of the Government* while acting within the scope of his office or employment . . . (Italics supplied)'
>
> *Id.* at 400.
>
> > As alleged in this case, the negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent of Carr's employment status.
>
> *Id.* at 401.

While this Court's opinion stops short of the result urged herein, *id.* at fn. 8, this Court did explain as follows:

> Two quite different theories might explain why Muniz's claim did not 'arise out of' the assault that caused his injuries. First, it might be assumed that since he alleged an independent basis for tort liability – namely, the negligence of the prison officials – the claim did not arise solely, or even predominantly, out of the assault. Rather, the attention of the trier of fact is focused on the Government's negligent act or omission, the intentional commission is simply considered as part of the causal link leading to the injury. Under this view, the assailant's individual involvement would not give rise to Government liability, but antecedent negligence by Government agents could, provided of course that similar negligent conduct would support recovery under the law of the State where the incident occurred. See Note, Section 2680(h) of the Federal Tort Claims Act: Government Liability for the Negligent Failure to Prevent An Assault and Battery by a Federal Employee, 69 GEO. L.J. 803, 822-825 (1981).

Id. at 400. This Court relied upon an alternative theory based on 28 U.S.C. § 1346(b); but carefully explained that its explanation "is narrower but not necessarily inconsistent" with the explanation above. *Id.* The implications of the majority opinion were clear enough to Justice Kennedy who would not allow a negligent supervision claim to proceed under the FTCA. *Id.* at 405-407,[2] and to the dissents, *id.* at 411.

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[2] Justice Kennedy unfortunately equated the concepts of negligent supervision and respondeat superior. The Restatement 2d of Torts, § 317 makes this point quite clearly:

> A master is under a duty to exercise reasonable care so to control his servant *while acting outside the scope of*

Petitioner respectfully suggests that when one employee attacks another, he is not acting within the course and scope of his employment so as to invoke the principle of respondeat superior. He is more akin to a prisoner attacking another prisoner, as in *Muniz*. (Indeed, just as the fact that a prisoner is attacked does not necessarily result in liability, the attack of one employee on another similarly does not necessarily result in liability. Neither a warden nor an employer is an insurer of safety). Such an attack as alleged herein never makes the employer liable under the principle of respondeat superior.

The decision below is incorrect for another reason. Going back to *Sheridan, supra,* there was alleged negligence as "a basis for Government liability that is entirely

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his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

(Emphasis supplied).

independent of [the attacker's] employment status." *Id.* at 401. Under Georgia law, O.C.G.A. § 34-2-10:

> Every employer shall furnish employment which shall be reasonably safe for the employee therein, shall furnish and use safety devices and safeguards, shall adopt and use methods and processes reasonably adequate to render such an employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees.

The breach of O.C.G.A. § 34-2-10 is an independent basis for FTCA liability. In rejecting this argument, the decision below directly conflicts with this Court's decision in *Sheridan*.

Only by reading *Sheridan* as barring any claim when one federal employee attacks another can the Court below's decision be affirmed.

3. The Question Presented Is Important

In interpreting a statute, a court must sometimes look to the legislative history. There is very little history on § 2680(h). The Senate Report says that "deliberate torts" are not covered. S. Rep. No. 1400, 79th Cong., 2nd Sess., at 33 (1946). There is also the following colloquy in hearings before the Committee on the Judiciary, House of Representatives:

> MR. CRAVENS: This refers to a deliberate assault.
>
> MR. SHEA: That is right.

MR. CRAVENS:	If he hit someone deliberately?
MR. SHEA:	That is right.
MR. CRAVEN:	It is not intended to exclude negligent assaults?
MR. SHEA:	No. An injury caused by negligence could be considered under the bill.

Hearings on H.R. 5373 and H.R. 6463 Before the House Committee of the Judiciary, 77 Cong., 2nd Sess., Ser. 13, at 33, 34 (1942). *See United States v. Spelar*, 338 U.S. 217, 220-221 (1949).

This Court has never confronted the implications of this intent. *Sheridan v. United States*, 487 U.S. 392 (1988), did not bring clarity. It instead "muddied the waters further." Kratzke, Some Recommendations Concerning Tort Liability of Government and Its Employees For Torts and Constitutional Torts, 9 ADM L.J. AM. U. 1105, 1116 (1996).

As one student commentator has noted:

> The Supreme Court's reluctance to define the scope of the FTCA in such cases has prompted disagreement among the circuits as to whether the government is liable where its own negligent hiring, supervision or training is the proximate cause of the alleged harm.

Veders, Survey A. Negligent Hiring, Supervision and Training – The Scope of the Assault And Battery Exception, *Senger v. United States*, 39 BCL.REV. 452 (1998).

Or, as Kratzke notes:

> The Court's analysis in Sheridan leaves the precise scope of the assault and battery exception unclear.

Id. Justice Kennedy thought as much in *Sheridan, id.* at 407.[3]

There are numerous decisions since *Sheridan*. They go all over the road. It is time for a map.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] "The Court is wrong to imply that this issue is somehow removed from the facts of this case. It is squarely implicated here, and the trial court should be advised how to deal with it, not left to wonder."

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-10139
Non-Argument Calendar

D.C. Docket No. 99-00458-CV-GET-1

RONALD L. FOSTER,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(August 30, 2000)

Before TJOFLAT, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

Ronald Foster, a postal worker, seeks to hold the United States responsible for injuries he sustained when he was struck and shot at with a handgun in the parking lot of the Atlanta Bulk Mail Center by a fellow postal worker after work. Foster's complaint under the Federal Torts Claims Act (FTCA)[1] alleges negligence on the part

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[1] 28 U.S.C. §§ 1346, 2671-80.

of the United States in supervising his attacker and failing to provide adequate work-place security. The complaint was dismissed by the district court for lack of subject-matter jurisdiction. The district court held that the "assault and battery" exception to the government's waiver of sovereign immunity as set forth in 28 U.S.C. § 2680(h) bars the claim. The district court alternatively held that Foster's claim should be dismissed because it failed to allege a breach of duty by the government independent of his attacker's employment status. Reviewing the dismissal under Federal Rules of Civil Procedure 12(b)(6) *de novo*,[2] construing the complaint liberally in favor of Foster, and taking all facts as true, we find no error.

The FTCA expressly retains sovereign immunity for "[a]ny claim arising out of assault [and] battery." 28 U.S.C. § 2680(h). In an effort to avoid this exception, Foster characterizes the United States's liability as that of negligent management and security, relying upon *Sheridan v. United States*, 487 U.S. 392 (1988). Foster's reliance on *Sheridan* is misplaced. As the Fifth Circuit stated in *Leleux v. United States*, 178 F.3d 750 (5th Cir. 1999) when considering a similar claim,

> "*Sheridan* stands for the principle that negligence claims related to a Government employee's § 2680(h) intentional tort may proceed where the negligence arises out of an independent, antecedent duty unrelated to the employment relationship between the tortfeasor

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[2] *See Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259, 1262 (11th Cir. 1999).

> and the United States. The *Sheridan* court was explicit that any tortious conduct committed **outside the scope of employment** is barred by the FTCA".

Id. at 757 (emphasis added) (footnote omitted) (citation omitted).

Foster's injuries arose out of, and were proximately caused by, the assault and battery upon him by his fellow employee outside the scope of his employment. His complaint against the United States is not based on an independent antecedent duty unrelated to his attacker's employment as a postal worker. It is simply a negligent supervision claim arising out of an alleged assault and battery which is barred by the intentional tort exception to the FTCA as set forth in § 2680(h). Therefore, the assault and battery exception bars Foster's claims.

Georgia tort law also bars Foster's claims, because the proximate cause of his injuries was that of an intervening third-party rather than conduct on the part of the United States. *See* 28 U.S.C. § 1346(b)(1); *see also Griffin v. AAA Auto Club South, Inc.*, 470 S.E. 2d 474, 476-77 (Ga. Ct. App. 1996).

AFFIRMED.[3]

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[3] Foster's request for oral argument is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD L. FOSTER, Plaintiff,	)	CIVIL ACTION NO. 1:99-cv-458-GET
v.	)	
UNITED STATES OF AMERICA, Defendant.	)	

ORDER

(Filed Nov. 5, 1999)

The above-styled matter is presently before the court on:

(1) Defendant United States of America's motion to dismiss, or in the alternative, motion for summary judgment [docket no. 6];

(2) Plaintiff's request for delay in consideration of defendant's motion to dismiss (contained in plaintiff's response to defendant's motion to dismiss) [docket no. 7].

Plaintiff, a former Postal Service employee, filed this action against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §1346(b), 2671-80, alleging that the Postal Service negligently failed to prevent plaintiff from being attacked by Ricky Williams, another Postal Service employee. Specifically, plaintiff alleges that defendant was negligent in (a) managing workplace relations between plaintiff and his supervisor; (b) retaining

Williams as a Postal Service employee; (c) failing to protect plaintiff from Williams; and (d) failing to provide adequate security. Defendant has moved to dismiss all of plaintiff's claims on the ground that Congress has not waived sovereign immunity with respect to plaintiff's claims and, therefore, the court lacks subject matter jurisdiction over this action.

Standard

A motion to dismiss for lack of subject matter jurisdiction can be raised at any time. Fed. R. Civ. P. 12(h) (3). To the extent that defendant's motion has been construed as one for summary judgment, the court does not intend to consider matters outside the pleadings and will treat the motion as a motion to dismiss only. Therefore, plaintiff's request for delay in consideration of defendant's motion to permit the plaintiff to conduct discovery (contained in plaintiff's response to defendant's motion to dismiss) [docket no. 7] is DENIED. In evaluating the defendant's motion to dismiss for lack of subject matter jurisdiction, the court must accept the allegations in the plaintiff's complaint as true and construe the facts in a light most favorable to the plaintiffs. *See Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986).

Facts

In light of the foregoing standard, the court finds the following facts for the purpose of resolving this motion to dismiss only. Plaintiff was an employee of the United States Postal Service at the Atlanta Bulk Mail Center in

Atlanta, Georgia in March 1997. Prior to that time, plaintiff had repeatedly complained to his supervisors and higher Postal Service managers that Ollie Cochran and Felicia Williams, plaintiff's immediate supervisors, were harassing, intimidating and treating plaintiff unfairly and disparately. Plaintiff requested transfers to other Postal facilities on numerous occasions but these requests were denied. Felicia Williams' husband, Ricky Williams, also was an employee of the Postal Service at a nearby facility. Mr. Williams served as Assistant Craft Director of the American Postal Worker's Union.

On March 20, 1997, plaintiff made a statement over the radio system used by drivers to communicate to the Bulk Mail facility protesting Felicia Williams' treatment of the plaintiff. Ms. Williams misinterpreted this statement as containing an adverse sexual reference to her and reported it to her husband, Ricky Williams. On March 21, 1997, Mr. Williams approached plaintiff who was in his vehicle attempting to leave the employee parking lot of the Bulk mail facility after his scheduled work shift. Mr. Williams first threatened plaintiff verbally before striking plaintiff on his left arm and left side of the head with a handgun. When plaintiff fell to his right side as a result of the assault, Mr. Williams fired the weapon at plaintiff, missing the plaintiff but damaging his automobile. As a result of his injuries and the ensuing emotional trauma, plaintiff has been unable to return to his position at the Postal Service and has taken disability retirement. Plaintiff filed a claim for worker's compensation for the injuries he sustained as a result of the assault under the Federal Employees Compensation Act which was denied on June 17, 1997.

Discussion

It is well-settled that sovereign immunity bars suit against the United States except to the extent that it consents to be sued. *See United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, (1980); *Powers v. United States*, 996 F.2d 1121, 1124 (11th Cir. 1993). It is equally settled that statutory waivers of sovereign have to be construed strictly in favor of the sovereign." *McMahon v. United States*, 342 U.S. 25, 27, 72 S. Ct. 17 (1951).

The FTCA is a specific, congressional exception to the general rule of sovereign immunity. *Suarez v. United States*, 22 F.3d 1064, 1065 (11th Cir. 1994). The FTCA gives jurisdiction to the federal district courts to hear civil actions against the United States for money damages for injuries caused by the negligent or wrongful acts or omissions of government employees while acting within the scope of their employment, subject to several exceptions. *See* 28 U.S.C. §2680. If any of these exceptions apply, "the FTCA claim must be dismissed for lack of subject matter jurisdiction." *Cohen v. United States*, 151 F.3d 1338, 1340 (11th Cir. 1998).

The defendant contends that two of these exceptions apply to this action. First, the defendant contends that plaintiff's claims "arise out of" an assault and battery which is explicitly excepted by Congress from a waiver of immunity. 28 U.S.C. §2680(h). Section 2680(h) provides that the provisions of this chapter and section 1346(b) of this title shall not apply to "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, . . . " *Id.*

To the extent that plaintiff attempts to hold the United States directly liable, on a respondeat superior theory, for Mr. William's actions, the court holds that the assault and battery exception clearly bars the claim. 28 U.S.C. §2680(h). Plaintiff attempts to avoid this exception, however, by characterizing the Postal Service's liability as that of negligent security and of negligently managing the individuals involved in the circumstances surrounding the assault. Specifically, plaintiff is alleging that the Postal Service was negligent in employing and supervising Ricky Williams because he committed the intentional tort of battery.

The Eleventh Circuit has stated that "a cause of action which is distinct from one of those excepted under §2680(h) will nevertheless be deemed to 'arise out of' an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is 'essential' to plaintiff's claims." *Metz v. United States*, 788 F.2d 1528, 1534 (11th Cir. 1986). *See Johnson by Johnson v. United States*, 788 F.2d 845, 850-854 (2d Cir.), *cert. denied*, 479 U.S. 914 (1986) (§26809(h) barred allegations of negligence in employment and supervision of postal employee who allegedly assaulted infant).

The Supreme Court's opinion in *Sheridan v. United States*, 487 U.S. 392, 108 S. Ct. 2449 (1988) did not overrule *Metz*. In *Sheridan*, the plaintiffs were shot on a public street by an intoxicated off-duty serviceman. The plaintiff's complaint alleged that the government had been negligent in failing to restrain the corpsman, who was drunk and carrying a weapon on Navy property in violation of Navy regulations. The court concluded, under the specific facts before it, that the claim was not barred by

§2680(h). *Id.* at 401-402, 108 S. Ct. at 2455. The court remanded for a determination of whether the United States could be held liable to plaintiff under Maryland law, if the United States were a private person under like circumstances. *Id.* Having found that the assailant's employment status was irrelevant to the outcome of the case, the court in *Sheridan* specifically declined to decide whether the §2680(h) exception bars claims for negligent hiring, training and supervision. *Id.* at 403, 108 S. Ct. at 2456 n.8. Justice Kennedy, however, addressed the issue in his concurring opinion:" [i]f the allegation is that the Government was negligent in the supervision or selection of the employee and that the intentional tort occurred as a result, the intentional tort exception of §2680(h) bars the claim." *Id.* at 406. On remand, the Fourth Circuit affirmed the district court's summary judgment for the government, writing that the "plaintiff's claim is, in reality, nothing more than a negligent supervision claim which is barred by the intentional tort exception." *Sheridan v. United States*, 969 F.2d 72, 75 (4th Cir. 1992).

Furthermore, the Supreme Court's opinion in *Sheridan* did not overrule the law of the Eleventh Circuit established in *Metz* and this approach remains the majority view of other Circuits. *See Perkins v. United States*, 55 F.3d 910 (4th Cir. 1995) (dismissing claim based on negligent retention or supervision of IRS agent pursuant to 2680(c) exception); *Wise v. United States*, 8 F. Supp.2d 535 (E.D. Va. 1998) (dismissing claims against government for negligent hiring, retention, training following assault and murder of plaintiff's child by Navy Seal pursuant to 2680(h)). *See also Garcia v. United States*, 776 F.2d 116 (5th

Cir. 1985) (§2680(h) held to bar claim of negligent supervision of military recruiter who allegedly sexually assaulted a prospective recruit); *Hughes v. United States*, 662 F.2d 219 (4th Cir. 1981) (§2680(h) precluded negligence action arising out of a postal worker's taking sexual liberties with children, since suit arose out of assaults and batteries); *Naisbitt v. United States*, 611 F.2d 1350 (10th Cir.), *cert. denied*, 449 U.S. 885 (1980) (victims of assaults, batteries, rapes and murders brought actions for negligent supervision and failure to prevent injuries; suit barred by section 2680(h) regardless of whether employee is on duty at the time of the crimes). *Cf. Boutin v. United States*, Civil Action No. 94-313P (D. R.I. 1995) (taking admittedly minority position that claims for negligent hiring, supervision or training can be basis for government liability for a foreseeable assault and battery by a government employee).

Finally, plaintiff has failed to allege any breach of duty by the government independent of Mr. William's employment status. The FTCA provides that the tort law of the state where the act or omission occurred governs liability. 28 U.S.C. §1346(b). Under Georgia law, an intervening criminal act of a third party insulates a proprietor from liability unless the proprietor has superior knowledge of the risk. *Griffin v. AAA Autoclub South, Inc.*, 221 Ga. App. 1, 2-3 (1996) (holding employer not liable to employee who was attacked by boyfriend on employer's premises even though employee had informed security guard of potential for harm). The plaintiff's complaint does not allege any *superior* knowledge on the part of the Government. To the contrary, the facts alleged by the plaintiff in his complaint require a finding that plaintiff

had knowledge at least equal, if not superior, to his employer with regard to the attack by Mr. Williams.

The language in §2680(h) expressly retains sovereign immunity for "[a]ny claim arising out of assault [and] battery." The broad scope of this language and the circumstances under which the instant case arose, dictate dismissal of plaintiff's claims. To permit plaintiff to recover from the government due to Ricky Williams' personal assault against plaintiff would improperly expand the scope of the FTCA's limited waiver of sovereign immunity beyond the express intention of Congress. Therefore, defendant's motion to dismiss [docket no. 6] is GRANTED.

Because the Court has found that the assault and battery exception applies to plaintiff's claims, the court will not address defendant's second defense under the discretionary function exception.

Summary

(1) Defendant United States of America's motion to dismiss, or in the alternative, motion for summary judgment [docket no. 6] is GRANTED;

(2) Plaintiff's request for delay in consideration of defendant's motion to dismiss (contained in plaintiff's response to defendant's motion to dismiss) [docket no. 7] is DENIED.

SO ORDERED, this 5 day of November, 1999.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL, JUDGE
UNITED STATES DISTRICT
JUDGE

Supreme Court, U.S.
FILED

FEB 1 2001

OFFICE OF THE CLERK

(2)

No. 00-907

In the Supreme Court of the United States

RONALD L. FOSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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12pp

QUESTION PRESENTED

Whether a plaintiff can avoid the statutory bar under the Federal Tort Claims Act on recovery for claims arising out of assault and battery, 28 U.S.C. 2680(h), by pleading that the government was negligent in hiring or supervising the government employee who committed the assault or battery.

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In the Supreme Court of the United States

No. 00-907

RONALD L. FOSTER, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unpublished, but the decision is noted at 233 F.3d 579 (Table). The order of the district court (Pet. App. 4-12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2000. The petition for a writ of certiorari was filed on November 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action under the Federal Tort Claims Act (FTCA) alleging that the United States negligently

failed to prevent a violent assault perpetrated on petitioner by fellow Postal Service employee Ricky Williams. Petitioner alleges that Williams struck and shot at him with a handgun while petitioner was departing from the parking lot of the Atlanta Bulk Mail Center after work. Petitioner further alleges that this incident stemmed from a workplace dispute between petitioner and Williams's wife, who was one of petitioner's supervisors. The complaint alleges negligence by the Postal Service in supervising Williams and in failing to provide adequate security for employees at the Bulk Mail Facility. Pet. App. 1-2.

The district court granted the government's motion to dismiss for lack of subject matter jurisdiction. Pet. App. 4-12. The court held that the "assault" and "battery" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(h), bars the claim. Pet. App. 11. Alternatively, the district court held that the government could not be held liable under Georgia law for Williams's intervening criminal conduct. *Ibid.* The district court did not reach the government's defenses based on the discretionary function exception. *Ibid.*; see 28 U.S.C. 2680(a).

The court of appeals affirmed in an unpublished opinion. Pet. App. 1-3. That court held that because petitioner's complaint does not allege breach of an independent, antecedent duty unrelated to Williams's employment status, it is simply a claim for negligent supervision barred by the FTCA's "assault and battery" exception. *Id.* at 3. The court of appeals also held that Georgia law bars petitioner's claims because the proximate cause of his injuries was the conduct of an intervening third party rather than conduct by the United States. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. Every court of appeals that has considered the issue except the Ninth Circuit has held that a plaintiff cannot avoid the FTCA's bar on recovery for claims arising out of assault or battery by pleading negligent hiring and supervision against the United States. Even though there is a conflict between the decision below and decisions of the Ninth Circuit, this case is not an appropriate one to resolve that conflict because an adequate state law ground supports the judgment.

1. The FTCA provides the exclusive remedy for tort actions against the United States. The remedy is limited to those claims for which the FTCA clearly and explicitly waives sovereign immunity. 28 U.S.C. 2679(a) and (b)(1). The United States has not waived immunity for claims for intentional torts; the statute expressly bars recovery for "[a]ny claim arising out of assault [or] battery." 28 U.S.C. 2680(h).[1]

This Court has considered the scope of the intentional tort exception in three cases. See *Sheridan* v. *United States*, 487 U.S. 392 (1988); *United States* v. *Shearer*, 473 U.S. 52 (1985); *United States* v. *Muniz*, 374 U.S. 150 (1963). Contrary to petitioner's suggestion (Pet. 6-9), none of these cases holds or even intimates that a plaintiff may circumvent the statutory bar on recovery for injuries arising out of an assault and

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[1] Section 2680 provides, "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680 and (h).

battery by pleading that the United States was negligent in hiring or supervising the assailant. In *Shearer*, this Court held that the doctrine of *Feres* v. *United States*, 340 U.S. 135 (1950), barred recovery under the FTCA. 473 U.S. at 59. Four of the eight sitting Justices also would have held that the assault and battery exception barred a claim for negligent failure to prevent a battery by a serviceman allegedly known to have violent propensities. *Id.* at 54-57. Three years later in *Sheridan*, this Court held that claims based on an independent duty, such as a duty to protect a victim or a good-samaritan duty, are not barred by the assault and battery exception where the assailant is not a federal employee or is a federal employee acting outside the scope of his employment. 487 U.S. at 400. The Court expressly declined to consider whether claims based on an employment relationship (negligent hiring, supervision or training) are barred by the assault and battery exception. *Id.* at 403 n.8.[2] *Muniz* dealt with the narrow question whether prisoners can sue under the FTCA. 374 U.S. at 165. Notably, *Muniz* assumed that the government could assert the intentional tort exception as a defense to liability on remand. *Id.* at 163 (noting that the government is not liable for the intentional torts of its employees). There is no conflict between the decision below and decisions of this Court.

Moreover, contrary to petitioner's contention (Pet. 8-9), petitioner's complaint does not present a question regarding negligence "entirely independent of [the

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[2] In a concurring opinion, Justice Kennedy stated that he would have reached the reserved question and would have held that a plaintiff may not maintain a claim based only on the employment relationship between the intentional tortfeasor and the government. 487 U.S. at 404.

attacker's] employment status." The allegations in the complaint concern the Postal Service's alleged negligence in failing to supervise Williams and failing to prevent him from assaulting petitioner. There is no allegation of breach of an independent, antecedent duty by the United States.[3]

2. With the exception of the Ninth Circuit, all the courts of appeals that have considered the issue since *Sheridan* have held, consistent with the decision of the Eleventh Circuit below, that the statutory bar on recovery for claims arising out of assaults and batteries cannot be circumvented by pleading that the assault or battery that injured the plaintiff was caused by the government's negligent supervision or hiring. See, *e.g.*, *Leleux* v. *United States*, 178 F.3d 750, 757 (5th Cir. 1999) (barring claim of negligence against United States in seduction of recruit by Naval officer because negligence did not arise out of "an independent, antecedent duty unrelated to the employment relationship between the tortfeasor and the United States"); *Perkins* v. *United States*, 55 F.3d 910, 916-917 (4th Cir. 1995) (rejecting "negligent supervision" and "negligent retention" claims); *Franklin* v. *United States*, 992 F.2d 1492, 1498-1499 (10th Cir. 1993) (barring claim of negligence against United States in case of medical battery by VA hospital employee because claim was contin-

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[3] Petitioner argues (Pet. 9) that the Postal Service violated a Georgia statute, Ga. Code Ann. § 34-2-10 (1998), which requires that every employer provide a reasonably safe workplace. If petitioner is claiming that the Postal Service's breach of duty caused a workplace injury, his exclusive remedy is under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.* See *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 191 (1983) (under 5 U.S.C. 8116(c), "a federal employee may not bring a tort suit against the Government on the basis of a work-related injury").

gent on employment relationship); *Guccione* v. *United States*, 847 F.2d 1031, 1037 (2d Cir. 1988), reh'g denied, 878 F.2d 32, 33 (1989) (barring claim that United States was negligent in failing to supervise undercover agent because claim was not "entirely independent" of employment relationship), cert. denied, 493 U.S. 1020 (1990).

These decisions are consistent with pre-*Sheridan* decisions of numerous courts of appeals. See, *e.g.*, *Thigpen* v. *United States*, 800 F.2d 393, 395-396 (4th Cir. 1986) (barring assertion of a negligent supervision claim against United States by children who were sexually assaulted by naval hospital employee); *Hoot* v. *United States*, 790 F.2d 836, 838 (10th Cir. 1986) (dismissing suit alleging that assault occurred because of government negligence in denying soldier's request for mental examination and treatment); *Metz* v. *United States*, 788 F.2d 1528, 1534 (11th Cir.) (holding that negligence claim arose out of excepted claim where underlying conduct, which constituted intentional tort, was essential to claim), cert. denied, 479 U.S. 930 (1986); *Johnson* v. *United States*, 788 F.2d 845, 850-854 (2d Cir.) (dismissing suit alleging that assault occurred because of government negligence in employment and supervision of postal employee who assaulted infant), cert. denied 479 U.S. 914 (1986); *Garcia* v. *United States*, 776 F.2d 116, 118 (5th Cir. 1985) (dismissing claim of negligent supervision of military recruiter who sexually assaulted a prospective recruit). As noted, however, the Ninth Circuit has held that the statutory bar on recovery for claims arising out of assaults and batteries can be avoided by pleading that the assault or battery that injured the plaintiff was caused by the government's negligent supervision or hiring. See *Senger* v. *United States*, 103 F.3d 1437, 1442 (9th Cir.

1996) (jurisdiction over negligent hiring and supervision claim); *Brock* v. *United States*, 64 F.3d 1421, 1425 (9th Cir. 1995) (same); see also *Bennett* v. *United States*, 803 F.2d 1502, 1503-1504 (9th Cir. 1986) (negligent hiring and supervision).[4]

This case is not an appropriate vehicle for this Court to resolve the conflict between the views of the Ninth Circuit and the other courts of appeals that have considered the question. An adequate state law ground supports the judgment. The FTCA provides that the tort law of the State where the act or omission occurred governs liability. 28 U.S.C. 1346(b). The Eleventh Circuit held that even if petitioner could state a claim that was not barred by Section 2680(h), he would have no cause of action under Georgia law because the proximate cause of his injuries was conduct by an intervening third party rather than conduct by the United States. Pet. App. 3a (citing 28 U.S.C. 1346(b)(1) and *Griffin* v. *AAA Auto Club South, Inc.*, 470 S.E.2d 474, 476-477 (Ga. Ct. App. 1996)).

This Court "do[es] not normally disturb an appeals court's judgment on an issue so heavily dependent on analysis of state law." *UNUM Life Ins. Co. of Am.* v. *Ward*, 526 U.S. 358, 368 (1999) (citing *Runyon* v. *McCrary*, 427 U.S. 160, 181-182 (1976)). Moreover, this Court generally defers to the lower federal courts'

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[4] A separate line of cases holds that negligent conduct, undertaken within the scope of employment and arising from breach of an independent, antecedent duty to protect the victim separate from a duty to prevent the assault, states a claim under the FTCA. See, *e.g.*, *Bembenista* v. *United States*, 866 F.2d 493, 498 (D.C. Cir. 1989) (breach of duty to protect blind, comatose hospital patient from sexual assault); *Doe* v. *United States*, 838 F.2d 220, 224 (7th Cir. 1988) (breach of duty to supervise children in government daycare). That issue is not presented in this case.

interpretations of state law. *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."). Accordingly, the district court properly dismissed petitioner's complaint because it did not state a claim under Georgia law. That state law ground, upheld by the court of appeals, adequately supports the judgment. Certiorari is therefore inappropriate to consider the alternative federal law ground for the judgment in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2000